U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-, INC.

DATE: FEB. 16, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of human resources and payroll services, seeks to permanently employ the Beneficiary as an ASP.net developer under the immigrant classification of member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director, Texas Service Center, denied the petition. The Director concluded that the record did not establish the Petitioner's continuing ability to pay the Beneficiary's proffered wage from the petition's priority date onward.

The matter is now before us on appeal. The Petitioner submits additional evidence and asserts that the Director erred by not considering its corporate structure and other evidence. The Petitioner asserts that the preponderance of the evidence establishes its ability to pay the proffered wage. Upon *de novo* review, we will dismiss the appeal.

A petitioner must demonstrate its continuing ability to pay a beneficiary's proffered wage from a petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

The accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), states the proffered wage of the offered position of ASP.net developer as $108,867 per year. The petition's priority date is November 26, 2013, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).[1]

A petitioner's ability to pay a proffered wage is essential in determining whether its job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977). We require a petitioner to demonstrate financial resources sufficient to pay a beneficiary's proffered wage. However,

[1] If approved, the petition would accord the Beneficiary a December 6, 2009, priority date from a prior, approved petition filed by another employer on his behalf. *See* 8 C.F.R. § 204.5(e) (stating that a beneficiary of multiple, approved employment-based petitions is entitled to the earliest priority date).

we will also consider the totality of the circumstances affecting a petitioner's business. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In determining a petitioner's ability to pay, we first examine whether the petitioner paid a beneficiary during the relevant period. If a petitioner establishes its employment of a beneficiary at a salary that equals or exceeds the proffered wage, we consider the evidence to be *prima facie* proof of its ability to pay the proffered wage.

If a petitioner does not establish its ability to pay based on wages paid to a beneficiary, we next examine its annual net income and net current amounts, without consideration of depreciation or other expenses. If a petitioner's annual net income or net current asset amounts equal or exceed the difference between the wages it paid and the annual proffered wage, the petitioner generally demonstrates its ability to pay. Federal courts have upheld our method of determining a petitioner's ability to pay. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305, 1309-10 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

In the instant case, the Beneficiary attested on the accompanying labor certification to his employment by the Petitioner since September 1, 2011. The record contains copies of IRS Forms W-2, Wage and Tax Statements, for 2013 and 2014. The Forms W-2 indicate the Petitioner's payments to the Beneficiary of $84,494.07 in 2013 and $9,451.24 in 2014.[2] Because the amounts on the Forms W-2 do not equal or exceed the annual proffered wage of $108,867, the record does not establish the Petitioner's ability to pay based on the wages it paid the Beneficiary.

The Director found that the Petitioner established its ability to pay in 2013. Because the petition's priority date of November 26, 2013 indicates that the Petitioner would have had to pay the Beneficiary for only about a month before the year's end, the Director prorated the 2013 proffered wage. The Director determined the prorated proffered wage of $9,072.25 for 2013 by dividing the annual proffered wage of $108,867 by 12, the number of months in a year. Because the 2013 Form W-2 showed the Petitioner's payment of more than $9,072.25 in 2013, the Director concluded that the record demonstrated the Petitioner's ability to pay in 2013.

The Director erred in finding the Petitioner's ability to pay in 2013. A petitioner demonstrates an ability to pay a prorated proffered wage if the record establishes the petitioner's payment of sufficient wages to a beneficiary or its receipt of sufficient net income *after a petition's priority date*. In the instant case, the Director prorated the proffered wage in 2013 but considered evidence of the

[2] The Director found that the Petitioner paid the Beneficiary $81,191.07 in 2013. The Director appears to have misread the copy of the 2013 Form W-2, parts of which are illegible. In 2014, the Petitioner states its employment of the Beneficiary only in January, before he began working for another employer.

Petitioner's wages to the Beneficiary for the entire year, not for wages after the petition's priority date. We will not consider the Petitioner's payment of wages over 12 months to demonstrate its ability to pay a proffered wage over one month.

The record does not establish the Petitioner's payment of sufficient wages or receipt of sufficient net income in 2013 after the petition's priority date of November 26 to establish its ability to pay. Dividing the $84,494.07 amount the Petitioner paid to the Beneficiary in 2013 by 12 months indicates that the Petitioner paid the Beneficiary about $7,041.17 per month, less than the prorated proffered wage of $9,072.25. The record lacks copies of the Beneficiary's payroll records to more precisely determine his 2013 wages after November 26. The record therefore does not establish the Petitioner's ability to pay in 2013 based on a prorated proffered wage.

The Petitioner similarly argues that its wage payments to the Beneficiary in 2014 demonstrate its ability to pay. As previously noted, the 2014 Form W-2 indicates the Petitioner's payment of $9,451.24 to the Beneficiary that year. Counsel asserts that the Petitioner's paid the Beneficiary for only one month of work in 2014. Because $9,451.24 exceeds the monthly proffered wage of $9,072.25, counsel argues that the Petitioner has demonstrated its ability to pay in 2014.

As evidence of the Beneficiary's departure from the Petitioner's employment after January 2014, the Petitioner submitted a copy of an approval notice for an H-1B nonimmigrant visa petition, dated December 30, 2013. The H-1B approval notice establishes the Beneficiary's authorization to work for another company in the U.S. after the H-1B petition's filing on December 18, 2013. *See* section 214(n)(1) of the Act, 8 U.S.C. § 1184(n)(1) (allowing H-1B visa holders to begin working for new H-1B employers upon the filing of new petitions). However, the H-1B approval notice does not indicate when the Beneficiary left the Petitioner's employment or when he began working for the other company. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (finding that counsel's unsupported assertions do not establish facts of record); *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (stating that a petitioner's uncorroborated assertions are insufficient to meet the burden of proof in visa petition proceedings).

In addition, even if the record established the Petitioner's payment of the Beneficiary's salary for one month in 2014, that period is of insufficient length to determine a petitioner's ability to pay a proffered wage. Business cycles, market fluctuations, and other economic factors may temporarily distort a company's finances. Therefore, for the foregoing reasons, the record does not establish the Petitioner's ability to pay the beneficiary in 2014 based on the wages it paid him.

Although the record does not demonstrate the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary, we credit the payments. The Petitioner need only demonstrate its ability to pay the differences between the amounts on the Form W-2 and the annual proffered wage. Therefore, the Petitioner must demonstrate an ability to pay $24,371.93 in 2013 and $99,415.76 in 2014.

The record before the Director closed on March 27, 2015, with his receipt of the Petitioner's response to his notice of intent to deny (NOID), dated February 26, 2015. At that time, the

Petitioner's federal income tax return for 2014 was not yet due. Therefore, the Petitioner's 2013 IRS Form 1120, U.S. Corporation Income Tax Return, is its most recent tax document of record.

The Petitioner's 2013 tax return indicates net income of $(52,897) and net current assets of $(85,649).[3] Because the amounts are negative, the record does not establish the Petitioner's ability to pay the Beneficiary's proffered wage based on its net income and net current assets.

Therefore, based on examinations of the wages the Petitioner paid the Beneficiary, its net income, and its net current assets, the record does not establish the Petitioner's continuing ability to pay the proffered wages from the petition's priority date onward.

On appeal, the Petitioner argues that USCIS erred in ignoring evidence of its possession of sufficient funds to pay the Beneficiary's proffered wage in 2014. *See* 8 C.F.R. § 204.5(g)(2) (stating that a petitioner may submit "additional evidence, such as profit/loss statements, bank account records, or personnel records" in "appropriate" cases). The record contains copies of bank account statements from January 2014 through February 2015, indicating an average month-ending balance of about $161,540.35.

However, as the Director noted, the bank account statements are under the name [redacted] The name appears to refer to a Texas limited liability company (LLC) of the same name. *See* Tex. Office of the Comptroller, Taxable Entity Search, at [redacted] (accessed Nov. 16, 2015). Because the statements indicate the account's ownership by another entity, the Director did not consider them as evidence of the Petitioner's ability to pay. *See Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 403 (Comm'r 1986) (citation omitted) (stating that a corporation is a separate entity from its shareholders and other companies); *Sitar Rest. v. Ashcroft*, No. CIV. A. 02-30197-MAP, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003) (stating that regulations do not permit us to consider the financial resources of individuals or entities with no legal obligations to pay a proffered wage).

On appeal, counsel asserts that the Petitioner and the LLC process all of their business transactions through the single, "consolidated" bank account. Counsel's description of the account suggests the Petitioner's access to some or all of the account's funds. Counsel therefore argues that the bank account statements demonstrate the Petitioner's ability to pay the proffered wage in 2014.

However, counsel's assertions do not constitute evidence. *See Phinpathya*, 464 U.S. at 188 n.6 (finding that counsel's unsupported assertions do not establish facts of record). The name of an entity other than the Petitioner appears on the bank account statements. The record does not indicate

[3] Numbers in parentheses reflect negative amounts. Net current assets represent the difference between a petitioner's current assets and current liabilities. *See* Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 117 (3d ed., Barron's Educ. Series 2000). Lines 1 through 6 of Schedule L to IRS Form 1120 reflect a corporation's year-end current assets. Lines 16 through 18 of Schedule L reflect a corporation's year-end current liabilities.

the Petitioner's access to any of the account's funds. The bank account statements therefore do not establish the Petitioner's ability to pay the proffered wage in 2014.

The Petitioner also argues that the LLC is contractually obligated to pay the salaries of the Petitioner's employees. The Petitioner submits a copy of a "management services agreement" between the entities.

The agreement states that the Petitioner provides payroll and related services to the LLC "at no cost other than outside employment expenses and costs including, but not limited to, gross payroll, employer taxes, benefit costs, employee related insurance, and employer related insurance." In return, the agreement states that the LLC funds the Petitioner on the same day for all "expenses and costs." The agreement states a 10-year term that automatically renews for additional 10-year terms. The agreement also states that it can be terminated only by a "100% unanimous vote by all owners" of the LLC and the Petitioner.

In a February 13, 2015, letter, the accountant for the companies describes the Petitioner as "an employee leasing/management company" and the LLC as "an operating company that sells software and provides software support." The letter states that the LLC leases all of its employees from the Petitioner and that the Petitioner's only source of income "is the management/employee leasing fee it receives" from the LLC. The letter states that the LLC earned annual net profits in 2012 and 2013 after paying employee leasing fees of about $4 million in both years.

The Petitioner's director of finance also stated in a January 27, 2015, letter that the Petitioner receives all of its income from the LLC. The letter states that the Petitioner "will only have revenue in the amount of the Salary and Wages paid as a management fee" from the LLC. The letter states that the LLC "will transfer the required amount due in salary and wages" to the Petitioner.

The record does not establish the agreement's authenticity. The agreement is undated, but states an effective date of January 1, 2004. Online government records indicate the formation of the LLC on April 20, 2006. *See* Tex. Office of the Comptroller, Taxable Entity Search, at [redacted] (accessed Nov. 16, 2015). The record does not explain how the LLC entered into an agreement that took effect before the company's formation. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of a petition's proof may lead to a reevaluation of the reliability and sufficiency of remaining evidence in support of a petition).

Also, counsel describes the LLC as "a 100% wholly owned subsidiary" of the Petitioner. The Director found the LLC's tax documents to support that description. However, a copy of the LLC's federal tax return for 2013 contains a Schedule K-1, Partner's Share of Income, Deductions, Credit, etc., to IRS Form 1065, U.S. Return of Partnership Income, indicating the petitioning corporation's ownership of only 1 percent of the LLC. *See* U.S. Internal Revenue Serv., "Limited Liability Company," at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Limited-Liability-Company-LLC (accessed Nov. 16, 2015) (stating that the IRS treats domestic LLCs with more than

two members as partnerships for federal income tax purposes). Additional Schedules K-1 of record indicate that three individuals own the remaining 99 percent of the company.

The inconsistencies of record regarding the purported agreement's effective date and the LLC's ownership cast doubts on the Petitioner's claim of the LLC's legal obligation to fund the Beneficiary's proffered wage. *See Matter of Ho*, 19 I&N Dec. at 591-92 (stating that a petitioner must resolve inconsistencies of record by independent, objective evidence). The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the purported contract with the LLC.

As previously indicated, we may also consider the overall magnitude of a petitioner's business in determining its ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. at 614-15. In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning an annual net income of about $100,000. However, in the year of the petition's filing, the petitioner's tax returns did not reflect its ability to pay the proffered wage. During that year, the petitioner relocated its business, causing it to pay rent on two locations for a five-month period, to incur substantial moving costs, and to briefly suspend its operations. Despite these setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established its ability to pay. The petitioner established that she was a fashion designer whose work had been featured in national magazines. The record indicated that her clients included the then Miss Universe, movie actresses, society matrons, and women included on lists of the best-dressed in California. The record also indicated that the petitioner lectured at design and fashion shows throughout the U.S. and at California colleges and universities.

As in *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years the petitioner has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry; whether the beneficiary will replacing a current employee or outsourced service; and other evidence of its ability to pay a proffered wage.

In the instant case, the Petitioner's Form I-140, Petition for Alien Worker, states the company's establishment in [redacted] However, online government records indicate the Petitioner's incorporation in [redacted] *See* Tex. Office of the Comptroller, Taxable Entity Search, at [redacted] (accessed Nov. 16, 2015). The Petitioner's Form I-140 states 61 employees. However, in more recent correspondence, the Petitioner indicated its employment of more than 80 people.

Because the record contains only one year of tax returns, we are unable to determine whether the Petitioner's business has grown. The Petitioner submits evidence of its partnerships with national companies and its nomination by a national magazine as one of the 5,000 fastest-growing private companies in the U.S. However, based on the Petitioner's 2013 tax return, the business of the LLC, rather than the Petitioner, appears to have grown.

Unlike in *Sonegawa*, the record does not establish any uncharacteristic business losses or expenses. The record also does not contain evidence of the Beneficiary's replacement of a current employee or outsourced service. Thus, assessing the totality of the circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The instant Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of E-, Inc.*, ID# 14587 (AAO Feb. 16, 2016)